IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:

Applicant:	Stephen J. Brown		
Application No.:	09/665,442	Examiner:	Koppikar, V.
Filed:	September 19, 2000	Art Group:	3626
For:	MULTI-USER REMOTE HEALTH MONITORING SYSTEM WITH BIOMETRICS SUPPORT		

REPLY BRIEF

Mail Stop - Appeal Brief Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Appellant submits the following Reply Brief pursuant to 37 C.F.R. §41.41 for consideration

by the Board of Patent Appeals and Interferences.

STATUS OF CLAIMS

Claims 47-49, 51-62 and 77-110 are pending and remain rejected. Claims 1-46, 50 and 63-76 were previously cancelled. The Appellant hereby maintains the appeal of the rejections of claims 47-49, 51-62 and 77-110.

GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

The first ground of rejection is whether claims 47, 55-57, 77, 84, 91, 98, 105 and 107-110 are patentable under 35 U.S.C. §102(b) over Fujimoto, U.S. Patent No. 5,339,821.

The second ground of rejection is whether claims 48, 49, 51-54, 58-62, 78-83, 85-90, 92-97, 99-104 and 106 are patentable under 35 U.S.C. §103(a) over Fujimoto in view of Heinonen et al., U.S. Patent No. 6,421,633.

ARGUMENTS

A. 35 U.S.C. §102

1. Claims 47 and 55-57 are patentable over Fujimoto

Claim 47 provides a central processing unit comprising (i) **programming code configured to generate a script program** that collects measurement data relating to a physiological condition of an individual. Appellant's representative will now show that the Examiner's Answer does not meet all of the requirements of *Verdegaal Bros.*, M.P.E.P. §2131 and *Scripps Clinic & Research Found.* for the above claim limitation, and several other limitations to follow, and thus does not establish anticipation of the claimed invention.

The Examiner appears to maintain the assertions made during prosecution that (i) the host computer 5 of Fujimoto is similar to the claimed central processing unit and (ii) the medical apparatus 8 of Fujimoto is similar to the claimed remote programming apparatus.[1] Furthermore, the Examiner newly asserts that asking a user a question, as taught in column 4 lines 14-21 of Fujimoto, shows inherency of the claimed programming code.[2] The text of Fujimoto cited in the Examiner's Answer indicates that the medical terminal equipment 1 within the medical apparatus 8 asks the questions to the user. In contrast, the Examiner's inherency assertion does not meet the burden to establish the alleged inherent characteristic. Even if the burden was met, the alleged inherent characteristic is different that as claimed.

The Examiner does not provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from

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[1] Final Office Action, page 2, paragraph (A).

[2] Examiner's Answer, page 13.

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the teachings of the applied prior art, as required by M.P.E.P. §2112. There is no evidence or argument on record that would lead one of ordinary skill in the art to conclude that programming code configured to generate a script program that collects measurement data necessarily flows from the teaching of a medical terminal equipment 1 asking a user a question. The claim provides software generating more software, whereas the cited teachings of Fujimoto provide software generating a question on a display. The two operations are not related to each other and thus one is not inherent to the other. The questions of Fujimoto could be generated without programming code generating a script program. As such, the Examiner has failed to meet the burden to establish that Fujimoto inherency discloses the claimed programming code.

Assuming, *arguendo*, that the questions asked by the medical terminal equipment 1 of Fujimoto somehow inherently teach the claimed programming code (for which Appellant's representative does not agree), the inherency argument would place the claimed programming code within the medical apparatus 8, which the Examiner alleges is similar to the claimed remote programming apparatus. In contrast, the actual claim language provides that the programming code is in the central processing unit, which the Examiner alleges is similar to the host computer 5 of Fujimoto. Therefore, the inherency argument establishes a different structure than as presently claimed. As such, Fujimoto does not expressly or inherently disclose a central processing unit comprising programming code configured to generate a script program that collects measurement data relating to a physiological condition of an individual, as presently claimed.

Claim 47 further provides a remote processing apparatus (i) connectable to a measuring device to **receive measurement data according to a collect command contained in the script program**. The Examiner appears to maintain the assertions made during prosecution that (i)

the medical apparatus 8 of Fujimoto is similar to the claimed remote programming apparatus and (ii) the armband 10 of Fujimoto is similar to the claimed measuring device.[3] The Examiner newly asserts that the acceptance of a "Yes" answer or a "No" answer by the medical terminal equipment 1 per column 4 lines 18-25 of Fujimoto discloses an inherent capability similar to the claimed collect command.[4] Furthermore, FIG. 4 of Fujimoto shows buttons 27 for receiving user inputs, such as "Yes" and "No". In contrast, the Examiner's inherency assertion does not meet the burden to establish the alleged inherent characteristic. Even if the burden is meet, the alleged inherent characteristic does not address the claim language.

The Examiner does not provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art, as required by M.P.E.P. §2112. There is no evidence or argument on record that would lead one of ordinary skill in the art to conclude that a script program having a collect command to receive measurement data from the armband 10 necessarily flows from software that detects button presses. The button detection taught in Fujimoto has no connection to the armband 10 data receiving operation and thus one is not inherent to the other. The button detection could be performed without a collect command to receive measurement data from the armband 10. As such, the Examiner has failed to meet the burden to establish that Fujimoto inherency discloses the claimed collect command.

Assuming, *arguendo*, that button press detection capability of the CPU 25 in Fujimoto somehow inherently teaches a collect similar to the claimed collect command (for which Appellant's

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[3] Final Office Action, page 2, paragraph (A).

[4] Examiner's Answer, pages 13-14.

representative does not agree), the inherency argument still does not address how the CPU 25

receives blood pressure data and/or pulse data from the armband 10 through the pulse measuring

circuit 23. The alleged inherent collect command only addresses how the CPU 25 receives data from

the buttons 27. Nothing in the Examiner's Answer or Fujimoto ties the alleged inherent collect

command to the CPU 25 gathering data from the pulse measuring circuit 23. Therefore, Fujimoto

does not expressly or inherently disclose a remote processing apparatus connectable to a measuring

device to receive measurement data according to a collect command contained in the script program,

as presently claimed.

Claim 47 further provides that the remote processing apparatus is (ii) connectable to

the central processing unit to transmit the measurement data to the central processing unit **according**

to a transmit command contained in the script program. Regarding the claimed transmit

command, the Examiner cites to column 4 lines 14-56 of Fujimoto[5], which is a subset of the cites

made in the final Office Action. No further arguments or evidence are provided by the Examiner

concerning the claimed transmit commend. In contrast, the cited text of Fujimoto only appears to

discuss the collection and storage of blood pressure data and pulse data. As noted in the Appeal

Brief[6], Fujimoto appears to be silent regarding any transmit command within a script program

executing in the CPU 25 that causes measurement data to be sent from the medical apparatus 8 to

the host computer 5. Therefore, the Examiner has failed to meet the burden to show that Fujimoto

expressly or inherently discloses a remote processing apparatus is connectable to a central processing

unit to transmit the measurement data to the central processing unit according to a transmit command

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[5] Examiner's Answer, page 13.

[6] Appeal Brief, pages 21-22.

contained in the script program, as presently claimed.

Claim 47 further provides that the central processing unit is (B) **configured to perform** operations according to monitoring application programming. The Examiner asserts that the text after the phrase "configured to perform" is non-functional descriptive material.[7] The text of the claim following the phrase "configured to perform" concerns the operations of monitoring application programming. The Examiner's conclusion that the claimed monitoring application programming is non-functional descriptive material is in direct conflict with the definition of functional descriptive material as provided for in M.P.E.P. §2106.01 and thus cannot be sustained.

M.P.E.P. §2106.01 states:

> Descriptive material can be characterized as either "functional descriptive material" or "nonfunctional descriptive material." In this context, "functional descriptive material" consists of data structures and **computer programs** which impart functionality when employed as a computer component. (The definition of "data structure" is "a physical or logical relationship among data elements, designed to support specific data manipulation functions." The New IEEE Standard Dictionary of Electrical and Electronics Terms 308 (5th ed. 1993).) "Nonfunctional descriptive material" includes but is not limited to music, literary works, and a compilation or mere arrangement of data. (Emphasis added)
> ...
> USPTO personnel must consider all claim limitations when determining patentability of an invention over the prior art. *In re Gulack*, 703 F.2d 1381, 1385, 217 USPQ 401, 403-04 (Fed. Cir. 1983).

Since one of ordinary skill in the art would likely consider the claimed monitoring application programming to be computer programming under M.P.E.P. §2106.01, such computer programs are functional descriptive material by definition. Furthermore, under *In Re Gulack*, the claimed monitoring application programming must be considered in determining patentability over Fujimoto. Therefore, the Examiner's assertion that the claimed monitoring application programming is non-

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[7] Examiner's Answer, page 14.

functional descriptive material cannot be sustained. As such, claim 47 remains fully patentable over the cited reference and the rejection should be reversed.

2.   Claims 77 and 91 are patentable over Fujimoto

Claim 77 provides (C) transferring the script program from the central processing unit to the remote processing apparatus and (D) executing the script program in the remote processing apparatus to collect measurement data from the measuring device. As noted in the Appeal Brief, the Examiner did not provided any evidence or arguments concerning either of these claimed steps during prosecution.[8] The Examiner's Answer still does not address either of the claimed steps. Therefore, anticipation still has not been established due to the lack of evidence that Fujimoto expressly or inherently discloses all of the claim limitations as arranged in the claims. As such, claim 77 remains fully patentable over the cited reference and the rejection should be reversed.

Regarding claim 91, the Examiner asserts that the text after the phrase "configured to perform" is non-functional descriptive material.[9] In contrast, claim 91 does not contain the phrase "configured to perform" and thus it is unclear which words of the claim are in question. Since the record is ambiguous as to which parts of the claim allegedly contain non-functional descriptive material, the Examiner has not meet the burden to establish a case for anticipation. As such, claim 91 remains fully patentable over the cited reference and the rejection should be reversed.

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[8] Appeal Brief, page 25.

[9] Examiner's Answer, page 14.

3. Claims 84 and 98 are patentable over Fujimoto

Regarding claim 98, the Examiner asserts that the text after the phrase "configured to perform" is non-functional descriptive material.[10] In contrast, claim 98 does not contain the phrase "configured to perform" and thus it is unclear which words of the claim are in question. Since the record is ambiguous as to which parts of the claim allegedly contain non-functional descriptive material, the Examiner has not meet the burden to establish a case for anticipation. As such, claim 98 remains fully patentable over the cited reference and the rejection should be reversed.

Respectfully submitted,

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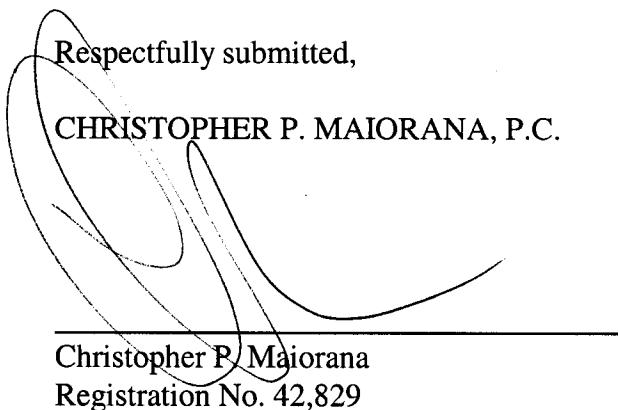
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c/o Sandeep Jaggi
Health Hero Network

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[10] Examiner's Answer, page 14.

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